

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICKY CLAYBURN,

Plaintiff,

v.

A. K. SCRIBNER, et al.,

Defendants.

CASE NO. 1:02-CV-6588-REC-LJO-P

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF ACTION
PURSUANT TO FEDERAL RULE OF CIVIL
PROCEDURE 4(M)

(Doc. 39)

Plaintiff Ricky Clayburn ("plaintiff") is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. Service of plaintiff's third amended complaint was found to be appropriate on December 10, 2004. (Doc. 37.) However, more than one-hundred twenty days have passed and plaintiff has not provided the court with information sufficient to initiate service of process.

Pursuant to Rule 4(m),

[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m).

In cases involving a plaintiff proceeding in forma pauperis, a United States Marshal, upon order of the court, shall serve the summons and the complaint. Fed. R. Civ. P. 4(c)(2). "[A]n incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for

1 service of the summons and complaint and ... should not be penalized by having his action dismissed
2 for failure to effect service where the U.S. Marshal or the court clerk has failed to perform his
3 duties.” Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994) (quoting Puett v. Blandford, 912
4 F.2d 270, 275 (9th Cir. 1990)), *abrogated on other grounds by* Sandin v. Connor, 515 U.S. 472
5 (1995). “So long as the prisoner has furnished the information necessary to identify the defendant,
6 the marshal’s failure to effect service is ‘automatically good cause’” Walker, 14 F.3d at 1422
7 (quoting Sellers v. United States, 902 F.2d 598, 603 (7th Cir.1990)). However, where a pro se
8 plaintiff fails to provide the Marshal with accurate and sufficient information to effect service of the
9 summons and complaint, the court’s sua sponte dismissal of the unserved defendants is appropriate.
10 Walker, 14 F.3d at 1421-22.

11 In this instance, this action is proceeding on plaintiff’s third amended complaint against
12 defendant Doe 1 on plaintiff’s Eighth Amendment claim. (Doc. 37.) There are no other defendants
13 in this action. The court cannot direct the United States Marshal to initiate service of process on an
14 unidentified defendant, and this action cannot remain pending in limbo. On February 2, 2005, the
15 court issued an order opening discovery for the limited purpose of allowing plaintiff to attempt to
16 identify defendant Doe 1. (Doc. 39.) Plaintiff was ordered to provide the court with the identity of
17 defendant Doe within one-hundred twenty days, and warned plaintiff that if he was unable to provide
18 a name and location for defendant Doe 1, this action must be dismissed. (Id.)

19 More than one-hundred twenty days have passed and plaintiff has not complied with or
20 otherwise responded to the court’s order. Accordingly, it is HEREBY RECOMMENDED that this
21 action be dismissed, without prejudice, pursuant to Federal Rule of Civil Procedure 4(m), for failure
22 to provide information sufficient for the court to direct the Marshal to initiate service of the
23 summons and complaint.

24 These Findings and Recommendations will be submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
26 **days** after being served with these Findings and Recommendations, the parties may file written
27 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
28 Findings and Recommendations.” The parties are advised that failure to file objections within the

1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
2 1153 (9th Cir. 1991).

3
4 IT IS SO ORDERED.

5 **Dated: June 27, 2005**
6 b9ed48

/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE